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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RONNIE F. ONLEY, Defendant and Appellant.	B233293 (Los Angeles County Super. Ct. No. BA361722)

APPEAL from a judgment of the Superior Court of Los Angeles County, John S. Fisher, Judge. Modified and, as so modified, affirmed.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James W. Bilderback II and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Ronnie F. Onley appeals his conviction for first degree murder. The trial court sentenced Onley to a term of 80 years to life in prison. Onley contends the prosecutor committed *Brady* error.[1] Further, he argues the trial court erred by denying his motions for a continuance and mistrial; failing to instruct the jury on late disclosure of evidence, and on voluntary manslaughter; and by imposing a 10-year gang enhancement, rather than a 15-year minimum parole eligibility requirement. Onley's latter contention has merit, and we modify the judgment accordingly. In all other respects we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

Viewed in accordance with the usual rules governing appellate review (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304; *People v. Robinson* (1997) 53 Cal.App.4th 270, 273), the evidence relevant to the issues presented on appeal established the following. In 2009, Onley and Jason Wilder were members of the 51 Nothing But Trouble Gangster Crips criminal street gang, also known as the "51 Troubles." Onley's moniker was "007." Victim Keith Moore was a member of the rival 55 Neighborhood Crips gang.

(i) *Onley's attempts to shoot Moore prior to the murder.*

Onley attempted to shoot Moore on at least four occasions in 2009 prior to the murder. In April 2009, Moore and his girlfriend, Latana Williams, were on the curb in front of Moore's house. Just after Moore went inside the house, Onley pulled up in a car, exited, and fired shots at the house. In June 2009, Moore and Williams were on Moore's front porch when Onley and another man jumped over a gate across from the house and "disappeared." Approximately 10 minutes later, five rounds were fired through Moore's windows into the house. In July 2009, Moore, Williams, and other members of the

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[1] *Brady v. Maryland* (1963) 373 U.S. 83.

55 Neighborhood Crips gang were standing outside a gang member's residence located at 54th Street and Denker Avenue, within the territory claimed by the 55 Neighborhood Crips gang. Onley drove past the house in a red Chevrolet Monte Carlo, followed by a blue Malibu. Onley and the occupant(s) of the Malibu fired toward the house. Moore fired back. In August 2009, Moore and Williams were in a car on 55th Street when Onley and another person drove past in the red Monte Carlo. Onley threw gang signs at Moore and Williams. Moore turned around and drove off, but Onley followed and caught up with them. Williams and Moore exited their car and attempted to take shelter in a mini-market located on Denker Avenue. Williams was able to enter the store, but as Moore was closing the security gate Onley exited the Monte Carlo and fired multiple rounds at the store. When his gun jammed, he drove off. Neither Williams nor Moore were hit by Onley's shots in any of these incidents. A bystander, Donald Riley, witnessed the August 2009 incident and identified Onley as the shooter. Williams did not report any of the incidents to police because Moore told her not to.

(ii) *Moore's murder.*

On August 14, 2009, police stopped Wilder while he was driving a light blue Toyota Camry that belonged to his girlfriend, Frances Goben. At the time of the traffic stop, Onley was seated in his red Monte Carlo, parked alongside the Camry, and was conversing with Wilder.

On the afternoon of September 5, 2009, Wilder again borrowed the blue Camry from Goben. That afternoon at approximately 2:40 p.m., police responding to a 911 call discovered Moore lying on the street near 55th Street and Denker Avenue. He had suffered fatal gunshot wounds to his lower back and upper thigh. A bicycle lay on a grass parkway nearby. Twelve .9-millimeter bullet casings were in the street. Eleven of the twelve bullet casings were manufactured by the same company and were fired from the same gun. The remaining casing was manufactured by a different company, and it could not be determined whether it had been fired from the same gun as the other 11.

Two bullet fragments found at the scene, and the two bullets that hit Moore, were fired from a single gun.[2]

Three witnesses—Riley, Ladonna Chapman, and Eugene Meyers—heard the gunshots and saw Onley hurrying or running from the area immediately after the shots stopped, pulling his T-shirt up over his face. None of the witnesses saw anyone else leaving the scene. Meyers told police that just prior to the shooting, he saw Moore riding a bicycle from an alleyway onto 55th Street, where Moore stopped behind a gray car. After the shooting, Meyers saw Onley run off and get into Wilder's powder blue Camry, which drove off. At the preliminary hearing and at trial Riley identified Onley as the person he saw leaving the scene. Chapman identified Onley in a pretrial photographic lineup and at trial. Meyers likewise identified Onley in a pretrial photographic lineup, and told police the person he saw was "007" from the 51 Troubles gang.[3]

At approximately 6:30 p.m. on the day of the shooting, a police officer spotted Onley driving his red Monte Carlo, and arrested him. Wilder was a passenger in the car at the time. A search of a small storefront area that comprised the front portion of Onley's residence revealed a storage case for a Smith and Wesson gun, and an ammunition box containing 18 rounds of .9-milimeter ammunition.

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[2] The criminalist was unable to determine whether the bullets removed from Moore's body were fired from the gun associated with the 11 casings, because projectiles cannot be compared to casings without examining the gun itself.

[3] In pretrial interviews with police, Meyers stated he had seen the shooting, described the shooter, and identified Onley as the shooter in a photographic lineup. At trial, Meyers recanted his statements to police. He denied telling police that Onley shot Moore, and claimed he had never seen Onley in his neighborhood. Meyers was a member of the victim's gang, the 57 Neighborhood Crips. The day after the shooting, Meyers was badly beaten by six members of his own gang as "discipline" because his name appeared in police reports. According to Meyers, in the gang culture it is not permissible to speak to police or testify in court, even against a rival gang member.

(iii) *Gang evidence.*

A gang expert testified that at the time of the murder, the 51 Troubles gang was actively at war with the 55 and 57 Neighborhood Crips gangs. As a result, there were approximately three shootings per week between members of the rival gangs. The area of 55th Street and Denker Avenue was within the territory claimed by the 55 Neighborhood Crips. Given a hypothetical based on the evidence presented at trial, the expert testified that the shooting was committed for the benefit of the gang.[4]

b. *Defense evidence.*

Detective Lyman Doster testified, inter alia, that Chapman had not been certain of her identification of Onley. Williams had told Doster about two, not four, prior incidents in which Onley shot at Moore. Williams also failed to identify anyone in a pretrial photographic lineup. When Meyers spoke to Doster on September 5, 2009, Meyers did not state that the shooter tried to cover his face with a T-shirt.

During the autopsy of Moore's body, gunshot residue was discovered on Moore's left hand. No gunshot residue was present on Moore's right hand. According to a defense gunshot residue expert, when a gun is fired gunshot residue can be deposited on the shooter's hands or on people or objects within two and one-half feet behind or to the sides of the gun, or up to 14 feet in front of the gun. The gunshot residue on Moore's hand could have been the result of Moore's having fired a gun, handled a gun that had been fired, being shot with a gun at close range, being in close proximity to gunfire, or being touched by someone who had handled a gun.

Roxana Vargas lived on Denker Avenue near 55th Street. On the afternoon of September 5, 2009, she was outside her home, washing her dogs. She heard a gunshot and glanced toward 55th Street "[f]or a quick second." She saw a small, light blue car

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[4] The gang expert additionally testified regarding the 51 Troubles gang's organization, primary activities, and pattern of criminal activity, among other things. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1399-1400.) Because Onley does not challenge the sufficiency of the evidence to support the gang enhancement, we do not detail that evidence here.

parked at the corner of 55th and Denker, and a person walking or running toward it. She was not close to the vehicle and "couldn't really see from where" she was. She could not see the person clearly and did not see his face. She grabbed her dogs and went inside her house. She initially thought the blue car might have been a BMW, but was not sure. She told a detective that she saw two men running, but at the time of trial did not recall seeing two men. When shown a pretrial photographic lineup, Vargas was unable to identify anyone. When interviewed by police, she identified a photograph of Goben's car as looking like the blue car she had seen.

2. *Procedure.*

Trial was by jury. Onley was convicted of first degree murder (Pen. Code, § 187, subd. (a)).[5] The jury found Onley personally and intentionally used and discharged a firearm, proximately resulting in Moore's death (§ 12022.53, subds. (b), (c), (d)), and that the murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). In a bifurcated proceeding, the trial court found Onley had suffered a prior conviction for robbery, a serious and violent felony (§ 667, subds. (a), (b)-(i), 1170.12, subds. (a)-(d)) and had served two prior prison terms within the meaning of section 667.5, subdivision (b). The court sentenced Onley pursuant to the Three Strikes law to a term of 80 years to life in prison. It imposed a restitution fine, a suspended parole restitution fine, a court security fee, and a criminal conviction assessment, and ordered Onley to pay victim restitution. Onley appeals.

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5 All further undesignated statutory references are to the Penal Code.

DISCUSSION

1. *Contentions related to belated discovery.*

a. *Additional facts.*

On March 8, 2011, immediately after the jury was sworn but before opening statements, the prosecutor provided defense counsel with a transcript of a detective's audiotaped interview of Vargas. The defense had not previously been informed of Vargas's existence or statements. In the police interview, Vargas had stated she lived in the neighborhood where the shooting occurred, heard gunshots, and saw two individuals running. She had failed to identify Onley in a pretrial photographic lineup. The prosecutor explained that she had taken over the case from another deputy district attorney and had just noticed the interview transcript, which had been previously overlooked by the People. Defense counsel opined that Vargas was an exculpatory witness, and moved for a mistrial. The trial court suggested that the defense immediately contact Vargas, and offered to pay for an "expedited investigator" in addition to the investigator already appointed, to assist in interviewing and subpoenaing Vargas. The court reserved ruling on the mistrial motion.

The next morning, March 9, 2011, the court conducted an ex parte hearing in chambers with defense counsel. Counsel confirmed that the defense investigator was interviewing Vargas at the courthouse simultaneously with the ex parte hearing. Counsel stated that the defense theory was that the witnesses to the shooting knew each other and may have collaborated to implicate Onley as the shooter. Counsel stated he needed additional time to determine where Vargas was during the shooting, what she saw, and the nature of the relationship between the witnesses. He wished to go back to the scene and view it from Vargas's vantage point.

Additionally, counsel had just received from the prosecutor a police log that contained the name of a previously undisclosed person, Shalondra Lawrence.[6] Counsel

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[6] The parties sometimes refer to Lawrence as Shalondra Lewis.

stated he needed more time to investigate Lawrence. He renewed the defense motion for a mistrial and alternatively requested a continuance. The prosecutor was invited into the hearing and informed the court and counsel that Lawrence's name appeared in a notation in a police chronological log. The investigating officer had no idea who Lawrence was, and there was no additional information regarding her. The officer was unsure whether Lawrence's name had come up when officers ran license plate numbers during the investigation, or was obtained from a 911 call. The police had never contacted Lawrence. The court again deferred ruling on the mistrial and continuance motions. It indicated it would permit a delay before the cross-examination of the People's first civilian witness to enable defense counsel to "regroup," confer with the defense investigator, and provide the court with a progress report.

After prosecution witness Riley's direct examination, in another ex parte conference, defense counsel informed the court he had learned where Vargas lived in relation to the shooting. He requested an immediate continuance so he could personally visit the crime scene and "see what Ms. Vargas would have seen" prior to his cross-examination of Riley. The court denied the request for a continuance and tentatively denied the mistrial motion, without prejudice.

Defense counsel presented his opening statement on the afternoon of Monday, March 14, 2011. The first defense witness was Vargas, who testified as set forth in the statement of facts, *ante*.

b. *Discussion.*

Onley contends the prosecutor committed *Brady* error by belatedly disclosing exculpatory evidence on the first day of trial. In related arguments, he avers that the trial court abused its discretion and violated his rights to due process, a fair trial, and effective representation by denying his requests for a continuance and a mistrial. Finally, he urges he was "entitled to an instruction on the late disclosure of evidence," and omission of such an instruction was prejudicial. None of these arguments have merit.

(i) *There was no Brady error.*

The due process clause requires a prosecutor to disclose to the defense all material evidence known to the prosecution team that is favorable to the defendant, even in the absence of a request. (*Kyles v. Whitley* (1995) 514 U.S. 419, 432-441; *Brady v. Maryland, supra,* 373 U.S. at p. 87; *People v. Clark* (2011) 52 Cal.4th 856, 981-982; *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1471-1472.) "There are three components of a *Brady* violation: (1) the evidence must be favorable to the accused, meaning it is exculpatory, or impeaching; (2) the evidence must have been willfully or inadvertently suppressed by the State; and (3) prejudice must have ensued because the evidence was material to the issue of guilt and innocence of the accused by establishing a reasonable probability of a different result." (*People v. Bowles* (2011) 198 Cal.App.4th 318, 325; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 175-176; *People v. Salazar* (2005) 35 Cal.4th 1031, 1043.) Evidence is favorable to the defense if it helps the defense or hurts the prosecution. (*People v. Clark, supra,* at p. 982; *People v. Verdugo* (2010) 50 Cal.4th 263, 279.) "Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Verdugo supra,* at p. 279.) We "independently review the question whether a *Brady* violation has occurred, but give great weight to any trial court findings of fact that are supported by substantial evidence." (*People v. Letner and Tobin, supra,* at p. 176.)

No *Brady* violation is apparent here. First, the undisclosed information was not material. Vargas's testimony was not favorable to Onley; it neither helped his case nor hurt the People's case. Vargas heard a gunshot but did not see the actual shooting. The gist of Vargas's testimony was that she was too far away to get a good view of the person she saw leaving the murder scene, and did not see his face. Therefore, her testimony was largely neutral. She was unable to either identify Onley or to say he was not the person she saw leaving the scene. Nor was her testimony regarding the blue car material. She stated she saw the person walking towards a small, light blue car on the corner after the

shooting. She initially thought the vehicle might be a BMW, but was unsure. This evidence was, at best, a mixed bag for the defense. Vargas's guess that the car was a BMW, rather than a Camry, might have been marginally helpful, had she not also stated she was unsure of the vehicle's make. Her corroboration of other witnesses' accounts that the person leaving the scene walked toward a small, light blue car parked on the corner was inculpatory, not exculpatory. In short, contrary to Onley's argument, Vargas's testimony was hardly "crucial to appellant's defense." " 'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' [Citation.]" (*People v. Fauber* (1992) 2 Cal.4th 792, 829.) Given its limited nature, it cannot be said that Vargas's testimony "put the whole case in such a different light as to undermine confidence in the verdict." (See *Kyles v. Whitley*, *supra*, 514 U.S. at p. 435; *In re Miranda* (2008) 43 Cal.4th 541, 575.)

Nor did *Brady* require disclosure of the police log containing Lawrence's name. The record reveals no information about Lawrence. The police never contacted her, and the investigating officer had no idea who she was or why her name was on the police log. "*Brady* . . . does not require the disclosure of information that is of mere speculative value. '[T]he prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense.' [Citations.]" (*People v. Gutierrez, supra,* 112 Cal.App.4th at p. 1472; *Moore v. Illinois* (1972) 408 U.S. 786, 795 ["We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case"]; *People v. Morrison* (2004) 34 Cal.4th 698, 715 ["the prosecutor had no constitutional duty to conduct defendant's investigation for him"].)

Second, Onley has not shown prejudice. Vargas testified at trial. "[E]vidence that is presented at trial *is not considered suppressed*, regardless of whether or not it had previously been disclosed during discovery." (*People v. Morrison, supra,* 34 Cal.4th at p. 715, italics added; *People v. Verdugo, supra,* 50 Cal.4th at p. 281.) Contrary to Onley's arguments, the record provides no basis for the conclusion that earlier disclosure

of Vargas's statements to police, or the existence of Lawrence's name on the police log, would have altered the defense trial strategy, the conduct of voir dire or witness examination, or the opportunities for impeachment of the prosecution witnesses. Onley's arguments to the contrary are based on nonspecific generalizations and speculation.

(ii) *Denial of requests for a continuance and mistrial.*

In the same vein, Onley argues that the court's failure to grant a continuance and/or his motion for a mistrial was an abuse of discretion and violated his rights to due process, a fair trial, and effective representation by counsel. We disagree.

A continuance of a criminal trial may be granted only for good cause, and the trial court has broad discretion to determine whether good cause exists. (§ 1050, subd. (e); *People v. Alexander* (2010) 49 Cal.4th 846, 934; *People v. Mungia* (2008) 44 Cal.4th 1101, 1118.) " '[O]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.' [Citations.]" (*People v. Alexander, supra,* at pp. 934-935.) We review the trial court's denial of a motion for a continuance for abuse of discretion. (*People v. Mungia, supra,* at p. 1118.) " 'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.' [Citations.]" (*Ibid.*) "In reviewing the decision to deny a continuance, '[o]ne factor to consider is whether a continuance would be useful. [Citation.]' " (*Ibid.*)

A mistrial should be granted when the court is apprised of prejudice that it judges incurable by admonition or instruction. " 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard. (*Ibid.*)

No abuse of discretion is apparent here. There was no showing a continuance was necessary or would have been useful. Vargas was readily available to the defense and ultimately testified at trial. The defense investigator located and interviewed Vargas the day after the prosecutor provided the defense with the interview transcript. The People did not call Vargas as a witness, and the defense did not call her until March 14, six days after her interview with the defense investigator. The court offered to pay for the services of a second investigator to assist in any additional investigation necessitated by the late disclosure. Vargas's testimony was neither complex nor time-consuming. Given that Vargas did not testify until almost a week after being interviewed by the defense, Onley's argument that counsel lacked sufficient time to prepare Vargas for trial is meritless, as is his contention that he lacked time to "seek out other evidence which would have corroborated her version of events."

Defense counsel indicated he sought a continuance so he could personally visit the crime scene and observe Vargas's vantage point, and gather information about Vargas's relationship with her neighbors. There is no showing why these simple tasks could not have been accomplished very rapidly, especially given the resources offered to the defense by the court. As we have noted, the record does not demonstrate how the defense strategy could have been significantly altered by Vargas's statements, or how her testimony could have impacted voir dire or the examination of the prosecution witnesses. To the contrary, given the substance of Vargas's police interview, her testimony was not of an ilk to have had significant impact.

Onley has not shown Lawrence was a percipient witness or could have provided any material evidence; her relevance to the case was speculative at best. (See generally *People v. Riggs* (2008) 44 Cal.4th 248, 297; *People v. Doolin, supra,* 45 Cal.4th at p. 451.) The trial court did not myopically or arbitrarily insist on denying the motions; it reserved ruling until it was satisfied Vargas had been located and interviewed. Because there was no incurable prejudice, the mistrial motion was properly denied as well. In sum, the trial court did not abuse its discretion by denying the motions for a continuance

and a mistrial, nor did the court's ruling violate Onley's rights to due process, to present a defense or to the effective assistance of counsel.

(iii) *Violation of California discovery statutes.*

To the extent Onley intends to assert a separate argument based on violation of the California discovery statutes, his contention likewise fails. Section 1054.1, California's reciprocal-discovery statute, " 'independently requires the prosecution to disclose to the defense . . . certain categories of evidence "in the possession of the prosecuting attorney or [known by] the prosecuting attorney . . . to be in the possession of the investigating agencies." ' " (*People v. Verdugo, supra,* 50 Cal.4th at pp. 279-280; *People v. Zambrano, supra,* 41 Cal.4th at p. 1133.) Evidence subject to disclosure includes, inter alia, "any '[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial' " and any exculpatory evidence. (*People v. Verdugo, supra,* at p. 280; § 1054.1, subds. (f), (e).) " 'Absent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial.' " (*People v. Verdugo, supra,* at p. 280; § 1054.7; *People v. Zambrano, supra,* at p. 1133.) "Upon a showing both that the defense complied with the informal discovery procedures provided by the statute, and that the prosecutor has not complied with section 1054.1, a trial court 'may make any order necessary to enforce the provisions' of the statute, 'including, but not limited to, immediate disclosure, . . . continuance of the matter, or any other lawful order.' " (*People v. Verdugo, supra,* at p. 280; § 1054.5, subd. (b).) A violation of section 1054.1 is subject to the harmless-error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Verdugo, supra,* at p. 280; *People v. Zambrano, supra,* at p. 1135, fn. 13.)

It is not clear the People failed to comply with section 1054.1. The People did not intend to call Vargas or Lawrence as witnesses. As we have discussed, Vargas's testimony was not exculpatory, and nothing more was known about Lawrence. But even assuming arguendo the prosecutor's inadvertent failure to provide Vargas's police interview and the log containing Lawrence's name to the defense violated the statute,

Onley has failed to establish he was entitled to a remedy other than that provided by the court. A trial court "has broad discretion to fashion a remedy in the event of discovery abuse to ensure that a defendant receives a fair trial." (*People v. Bowles, supra,* 198 Cal.App.4th at p. 326.) We generally review a trial court's rulings on matters regarding discovery under an abuse of discretion standard. (*People v. Lamb* (2006) 136 Cal.App.4th 575, 581.) We discern no abuse of discretion here. For the reasons set forth *ante*, neither a continuance nor any other sanction was required to ensure Onley received a fair trial.

(iv) *Omission of instruction regarding late discovery.*

Onley next contends the trial court erred by failing to instruct the jury with CALCRIM No. 306, regarding late discovery, as a sanction for the People's late disclosure of Vargas's police interview.[7] Onley also asserts the instruction should have been given in regard to the prosecution's purportedly late disclosure of information that witness Meyers had been beaten by members of his own gang as a result of speaking to police about the murder.

As noted, a trial court may make any order necessary to enforce the statutory California discovery provisions. (*People v. Verdugo, supra*, 50 Cal.4th at p. 280.) As one such remedy, the court may " 'advise the jury of any failure or refusal to disclose and of any untimely disclosure.' " (*Ibid*.)

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[7] CALCRIM No. 306 provides, in pertinent part: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the (People/defense) failed to disclose [specified evidence] [within the legal time period]. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

Onley's contentions lack merit for several reasons. First, although Onley requested CALCRIM No. 306 be given in regard to the purportedly late disclosure of information about the Meyers beating, Onley never made a similar request in regard to the disclosure of Vargas's police interview. The trial court had no duty to give the instruction sua sponte, and Onley has forfeited his claim. (See generally *People v. Gutierrez* (2009) 45 Cal.4th 789, 824 [pinpoint instructions are not required to be given sua sponte].) Onley's contention that his request to give the instruction in regard to the Meyers evidence "should be deemed sufficient to cover all matters of late discovery" is not persuasive. The trial court cannot be expected to be prescient.

Onley has also failed to establish that his counsel was ineffective for failing to request the instruction in regard to the Vargas police interview. "A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted.' " (*People v. Holt* (1997) 15 Cal.4th 619, 703; *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Lopez* (2008) 42 Cal.4th 960, 966.) " 'If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]' " (*People v. Gamache* (2010) 48 Cal.4th 347, 391; *People v. Camino* (2010) 188 Cal.App.4th 1359, 1377.)

Onley has failed to establish either prong of his ineffective assistance claim. The record suggests counsel failed to request the instruction as a tactical matter. Counsel had repeatedly requested continuances and a mistrial based on the belated discovery of Vargas's testimony, and was obviously aware of the availability of CALCRIM No. 306 in that he requested it in regard to portions of Meyers's testimony. The record sheds no light on why counsel pursued this course, but this is not a case in which there could have been no satisfactory explanation. It is also clear that a more favorable result was unlikely

even if the instruction had been given. Vargas was not a key witness with important exculpatory evidence, and the jury was unlikely to find it significant that her interview had been belatedly disclosed.

It is not clear the prosecutor committed any discovery violation in regard to information that Meyers had been beaten by his own gang in retribution for talking to police. Defense counsel never complained about late disclosure of this information until the parties were discussing jury instructions. The prosecutor's response suggested Meyers had not disclosed the information to the People until just before he testified, at which point the prosecutor informed defense counsel. Even assuming arguendo the disclosure was late, there was no *Brady* violation. Evidence that Meyers recanted his identification of Onley as the shooter after being beaten for talking to police was inculpatory, not exculpatory, evidence, in that it tended to credibly explain why Meyers changed his story. Belated disclosure would have violated section 1054.1, subdivision (f) (requiring disclosure of the statements of prosecution witnesses). But even if the failure to give the instruction was error, it was manifestly harmless under any standard. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *Chapman v. California* (1967) 386 U.S. 18, 24.) It is difficult to conceive of a theory under which the jury would have rendered a more favorable result for Onley had it believed the prosecution failed to timely disclose evidence about Meyer's beating. Moreover, the defense had ample means to impeach Meyers, in light of his prior convictions, gang membership, mental health issues, and use of related medications. The failure to give the instruction, even if error, was harmless.

2. *The trial court properly declined to instruct on voluntary manslaughter.*

Onley next contends the trial court violated his federal constitutional rights to due process, a fair trial, and to present a defense by failing to instruct the jury on voluntary manslaughter as a lesser included offense of murder. We discern no error.

A trial court must instruct the jury, sua sponte, on the general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Abilez* (2007) 41 Cal.4th 472, 517; *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Instructions on a lesser included offense must be given when there is substantial evidence from which the jury could conclude the defendant is guilty of the lesser offense, but not the charged offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584 (*Manriquez*); *People v. Cook* (2006) 39 Cal.4th 566, 596.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*Manriquez, supra,* at p. 584; *People v. Benavides* (2005) 35 Cal.4th 69, 102.) In deciding whether there is substantial evidence of a lesser included offense, we do not evaluate the credibility of the witnesses, a task for the jury. (*Manriquez, supra,* at p. 585.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Booker* (2011) 51 Cal.4th 141, 181; *Manriquez, supra,* at p. 587; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.) Doubts about the sufficiency of the evidence to warrant an instruction should be resolved in the defendant's favor. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a); *Manriquez, supra,* 37 Cal.4th at p. 583.) Voluntary manslaughter is the intentional but nonmalicious killing of a human being. (*Manriquez, supra,* at p. 583; *People v. Moye, supra,* 47 Cal.4th at p. 549; *People v. Benavides, supra,* 35 Cal.4th at p. 102; § 192, subd. (a).) Voluntary manslaughter is a lesser included offense of murder. (*Manriquez, supra,* at p. 583; *People v. Lee* (1999) 20 Cal.4th 47, 59.) A killing may be reduced from murder to voluntary manslaughter if it occurs upon a sudden quarrel or in the heat of passion on sufficient provocation, or if the defendant kills in the unreasonable, but good faith, belief that deadly force is necessary in self-defense. (*Manriquez, supra,* at p. 583; *People v. Lee, supra,* at pp. 58-59.)

No evidence supported a heat of passion theory in the instant matter. "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.) The provocation that incites the defendant to homicidal conduct must be

caused by the victim or be conduct reasonably believed by the defendant to have been engaged in by the victim. (*Manriquez, supra*, 37 Cal.4th at p. 583.) It may be physical or verbal, but it must be sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Id*. at pp. 583-584; *People v. Lee, supra*, 20 Cal.4th at p. 59.) A defendant may not set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable person. (*Manriquez, supra*, at p. 584; *People v. Oropeza, supra*, 151 Cal.App.4th at pp. 82-83.) No specific type of provocation is required, and the passion aroused need not be anger or rage, but can be any violent, intense, high-wrought or enthusiastic emotion other than revenge. (*People v. Lasko* (2000) 23 Cal.4th 101, 108; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704.)

There was no evidence from which a reasonable jury could have found Onley acted in the heat of passion provoked by the victim. There was no evidence the victim provoked Onley in any way. The shooting was not preceded by an argument or an exchange of heated words. There was no evidence Moore physically attacked, taunted, or threatened Onley, or engaged in any provocative conduct toward him at or near the time of the murder. There was likewise no evidence Onley was acting "under 'the actual influence of a strong passion' " when he shot. (*People v. Moye, supra*, 47 Cal.4th at p. 550.) No evidence was presented regarding Onley's mental state. Witnesses testified that they saw Onley hurrying from the scene, attempting to pull his T-shirt over his face, but nothing about this conduct suggested Onley acted out of passion rather than from judgment. (*People v. Moye, supra*, at p. 553.) Onley did not display any signs of "anger, fury, or rage; thus, there was no evidence that defendant 'actually, subjectively, kill[ed] under the heat of passion.' [Citation.]" (*Manriquez, supra*, 37 Cal.4th at p. 585.)

Onley argues that he and Moore had a "violent, confrontational," "tumultuous relationship which included shooting back and forth at each other on various occasions preceding the murder"; they were members of rival gangs which were engaged in a gang war; Moore was seen riding his bicycle away from territory claimed by Onley's gang

right before the murder; Moore had gunshot residue on one of his hands; and one of the bullet casings at the murder scene was made by a different manufacturer than the others. This evidence, he posits, supported a heat of passion theory.

These arguments are meritless. Onley's contention that he and Moore were engaged in a violent relationship in which they frequently shot "back and forth" at each other mischaracterizes the record. The evidence showed that *Onley*, without provocation, repeatedly shot at *Moore* on at least four occasions before the murder, not the other way around. On only one of those occasions did Moore return fire. Far from demonstrating that Moore did anything to provoke *Onley*, this evidence suggested the opposite. There was no evidence Moore ever initiated hostilities or shot first.[8] Moreover, the single instance in which Moore returned fire occurred in July 2009, long before the September 2009 shooting. Even apart from the well-settled principle that a defendant who provokes a fight cannot himself assert provocation by the victim (*People v. Johnston*, *supra*, 113 Cal.App.4th at pp. 1312-1313), there was ample time for Onley's passions to have cooled since the July incident. To amount to manslaughter, a killing must occur " ' "upon a sudden quarrel or heat of passion" [citation]; that is, "suddenly as a response to the provocation, and not belatedly as revenge or punishment. . . . [I]f sufficient time has ela[ps]ed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter." [Citation.]' [Citation.]" (*People v. Hach* (2009) 176 Cal.App.4th 1450, 1458; *People v. Avila* (2009) 46 Cal.4th 680, 705; *People v. Fenenbock*, *supra*,

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8 Onley argues that the evidence about the prior shootings came from Moore's girlfriend, Williams, who was biased. He complains that Williams did not "provide the details of all of the encounters." From this, Onley argues the jury could have concluded the "exchanges between the men were not as one-sided as [Williams] testified." He also posits that Moore was on parole at the time of his murder, and "was not as innocent a[s] Williams seemed to suggest . . . ." Onley's argument is not only highly speculative, but also ignores the principle that we do not judge the credibility of the evidence when determining whether instructions on a lesser included offense were required. (*Manriquez*, *supra*, 37 Cal.4th at p. 585.) We consider the issue based on the evidence actually presented.

46 Cal.App.4th at p. 1704; *People v. Moye, supra*, 47 Cal.4th at p. 550 [a killing is not voluntary manslaughter where sufficient time has elapsed after alleged provocation]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144 [a passion for revenge does not reduce murder to manslaughter].)

It is axiomatic that the fact Onley and the victim were members of rival gangs does not, without additional evidence lacking here, support a heat of passion theory. A contrary rule would mean that virtually all murders perpetrated by gang members against gang rivals would be mitigated to manslaughter. That is not the law. Indeed, even a gang challenge is not enough to constitute legally adequate provocation. "Reasonable people do not become homicidally enraged when hearing" a gang reference or challenge. (*People v. Avila, supra,* 46 Cal.4th at p. 706; *People v. Enraca* (2012) 53 Cal.4th 735, 759 ["we have rejected arguments that insults or gang-related challenges would induce sufficient provocation in an *ordinary* person to merit an instruction on voluntary manslaughter"].)

Neither the evidence that one shell casing was made by a different manufacturer than the other 11 casings, nor the evidence Moore was seen riding his bicycle just prior to the murder and had gunshot residue on his left hand, provided any evidence, as opposed to mere speculation, that Moore did anything to provoke Onley. A trial court "need not give instructions based solely on conjecture and speculation." (*People v. Young* (2005) 34 Cal.4th 1149, 1200.)

Nor was there evidence that would have supported an imperfect self-defense theory. Imperfect self-defense is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury. (*People v. Booker, supra,* 51 Cal.4th at p. 182; *People v. Cruz* (2008) 44 Cal.4th 636, 664.) There was no evidence whatsoever presented regarding Onley's actual state of mind. There was no evidence Moore physically attacked Onley, or said or did anything that could have caused Onley to actually believe he was in danger.

The evidence cited by Onley does not suffice to show Moore was armed or fired first. Although one of the bullet casings was manufactured by a different company than the other 11, the evidence was inconclusive regarding whether it had been fired from the same gun as the others. It, like the other 11 casings, was a .9-millimeter, and the criminalist testified nothing led her to believe it was fired from a different firearm. The gunshot residue was found on Moore's left hand, not his right. Williams testified Moore was right-handed. No gun was found on or nearby Moore's person. According to the defense gunshot residue expert, the residue on Moore's left hand could have been deposited there in a variety of ways apart from Moore using, or holding, a gun. Indeed, the residue could have been the result of Moore's being shot at close range. Thus, this circumstantial evidence, without more, was not sufficient to allow the inference that Moore threatened Onley with a gun, precipitating the murder, as Onley appears to argue. Onley's theory that Moore was fleeing from rival gang territory and fired shots at him is entirely speculative. No witness testified to any aggressive actions by the victim. The contention that Onley likely believed he was in danger when he encountered Moore "based on earlier confrontations" is likewise meritless; as we have explained, in all the prior confrontations, Onley was the aggressor. A court is not obliged to instruct on theories that lack substantial evidentiary support (*People v. Burney* (2009) 47 Cal.4th 203, 246; *People v Johnson* (2009) 180 Cal.App.4th 702, 707; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 49), nor should it give instructions based solely on conjecture and speculation. (*People v. Young*, *supra*, 34 Cal.4th at p. 1200.)

In sum, because the evidence of heat of passion, legally adequate provocation, and an actual belief in the need to defend was lacking, the trial court properly omitted instructions on voluntary manslaughter. (*Manriquez*, *supra*, 37 Cal.4th at p. 586.)

Moreover, even if the trial court had committed instructional error—a conclusion we have rejected—any error would have been manifestly harmless.[9] The erroneous

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[9] Onley states in his reply brief that the omission of instructions on voluntary manslaughter "left the jury uninformed about an element of the charged offense, namely,

failure to instruct on a lesser included offense is an error of California law alone, and reversal is required only if it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*People v. Moye, supra*, 47 Cal.4th at pp. 555-556; *People v. Breverman, supra*, 19 Cal.4th at pp. 177-178.) The evidence Onley cites in support of his heat of passion and imperfect self-defense theories was attenuated, speculative, and weak. Further, the jury's finding Onley committed first degree murder necessarily included the conclusion Onley premeditated and deliberated. It is therefore clear under any standard that the omission of instructions on voluntary manslaughter was harmless. (*People v. Watson, supra*, 46 Cal.2d at p. 836*; Chapman v. California, supra*, 386 U.S. 18.)

3. *Modification of the judgment.*

The trial court imposed a stayed 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1)(C). The parties agree that because murder is a felony punishable by life imprisonment, a determinate term gang enhancement should not have been imposed. Instead, the trial court should have imposed a 15-year minimum parole eligibility period. We agree. (§ 186.22, subd. (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1011; *People v. Sok* (2010) 181 Cal.App.4th 88, 94; *People v. Fiu* (2008) 165 Cal.App.4th 360, 390.) We order the judgment modified accordingly.

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malice." He is incorrect. The jury was fully instructed regarding malice with CALCRIM No. 520.

DISPOSITION

The 10-year section 186.22 enhancement is stricken. A 15-year minimum parole eligibility requirement is imposed instead. (§ 186.22, subd. (b)(5).) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.